Central Law Journal.

ST. LOUIS, MO., APRIL 16, 1920.

LIMITATIONS ON POWER OF A STATE TO TAX INCOMES OF NON-RESIDENTS.

The United States Supreme Court, in two recent opinions, handed down on the same day has settled several perplexing questions concerning the power of a state to tax the income of non-residents. (Shaffer v. Carter, and Travis v. Yale & Towne Mfg. Co., both opinions being handed down March 1, 1920.)

The opinion in the Shaffer case discusses constitutional objections to any form of income taxation assessed against non-residents, while the opinion in the Travis case discusses the power of a state to discriminate between residents and non-residents in assessing such a tax. In the Shaffer case the Oklahoma Income Tax Law providing for the taxation of the "net income from all property owned and of every business, trade or profession carried on in this state by persons residing elsewhere," was held constitutional, there being no discrimination in assessing the tax against such non- residents. In the Travis case the New York Income Tax Law was held unconstitutional on the sole ground that non-residents subject to the tax were not allowed the same personal exemptions that were granted by the act to resident taxpayers.

The plaintiff in the Shaffer case was a resident of the city of Chicago who owned and operated certain oil wells in the state of Oklahoma. The net income from the plaintiff's Oklahoma properties was $1,500,000, upon which a tax of $76,000 was levied and made a lien on the plaintiff's property in Oklahoma. The plaintiff contended in the first place, that being a non-resident, although carrying on an occupation in Oklahoma, he could not be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against non-residents, is not only not a property tax but is not an excise or privilege tax, since no privilege is granted; the right of the non-citizen to carry on his business or occupation in the taxing state being derived, it was said, from the provisions of the federal Constitution. In reply to this contention, Justice Pitney, who wrote the opinion of the Court, said:

"States are not restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

The Court then takes up the objection that to tax the income of non-residents is practically to put obstacles in the way of the exercise of the right of a citizen of another state to carry on a business in the taxing state. The Court concedes that a state may not prohibit citizens of other states from carrying on legitimate business within its borders but "it does not follow," says the Court, "that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-

resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state."

The last observation of the Court brings up what to our mind is the strongest objection which the plaintiff in the Shaffer Case raised to the constitutionality of the Oklahoma act, i. e., that it permits residents to deduct from their gross income not only losses incurred within the state of Oklahoma but also those sustained outside of that state, while non-residents may deduct only those incurred within the state. The Court, however, in answer to this contention calls attention to the fact that the difference in this respect is "only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination."

To our mind the plaintiff's contention cannot be so easily disposed of as the Court attempts to dispose of it. The Court admits that a state may permit its own citizens to deduct from gross receipts losses wherever these accrue, but that it is under no obligation to accord to non-residents a deduction by reason of losses elsewhere incurred, for the reason that the state in the case of non-residents, only seeks to tax income from the non-resident's property or business within the state, while it taxes the income of residents from all sources. This argument does not satisfy our mind nor, we suspect, does it fully satisfy the mind of Justice Pitney, who shows what is passing through his mind when he makes the unnecessary observation that "it may be remarked, in passing, that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question."

It seems clear to us that a non-resident may be put to an unfair disadvantage under the Oklahoma law. His business in Oklahoma may be only part of a single business carried on in different states. The income of property in other states may be invested in Oklahoma and used to carry on the business there. The net result from the business, regarded as an entirety, may be much less than the net income from the properties located in Oklahoma. Therefore, a non-resident engaged in business in Oklahoma and other states might conceivably be at a disadvantage with his resident competitor engaged in a similar business covering different states, since the latter would be taxed on the net income from his whole business while the former is forced to pay a tax on the net income of the particular business done in Oklahoma. It seems to us that in order to give to non-residents, who are citizens of another state, the same privileges and immunities that are given to citizens of Oklahoma, the non-resident, engaged in a single business enterprise covering several states. should at least have the right, if he wishes to exercise it, to return his entire income derived from all sources and make the usual deductions for losses elsewhere incurred that a resident of Oklahoma may do. In other words, a non-resident should be allowed to treat a business covering more than one state as a whole or to regard the business in the taxing state as separate and distinct for which a return as provided for in the Oklahoma law would be proper.

In the decision in the Travis case, the Court recognizes the fundamental principle, which, we believe, it failed to recognize in the Shaffer case, that a state in imposing an income tax has no right to discriminate between residents and non-residents. In this case the basis of discrimination was a provision in the New York law which permitted residents to enjoy an exemption of $1,000 in the case of single persons and $2,000 in the cases of those who were heads of families. No such exemption was

granted to non-residents. The Court held that this provision discriminated against citizens of Connecticut and New Jersey who earned salaries from their employment in New York City. We cannot distinguish in principle the argument which the Court makes in behalf of the "commuters" of New Jersey and Connecticut from that which we have tried to make in the preceding paragraph in behalf of non-resident merchants engaged in a single business covering several states. The Court said:

"It is a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring states, many thousands of men and women, residents and citizens of those states, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the state of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York."

The Court in this argument, with which we fully agree, fails, however, to meet the argument of the New York authorities that these citizens of Connecticut and New Jersey, for whose interests the Court is so much concerned, may be deriving other income from property or business in other states on which they are not taxed and which may equal or exceed the exemption allowed in New York. To this argument the Court simply says that "it would be rash to assume that non-residents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them."

It seems to us that both cases decided by the Court proceed on the wrong theory. There is no question of the right of a state to tax incomes both of residents and of non-residents—in the first case against the person as to all income from all sources; in the second case, *in rem*, as to income from property or business located in the state. The sole question here is, can the non-resident, when a citizen of another state, be deprived of any of the privileges and immunities of citizens of the taxing state as guaranteed to him by Section 2 of Article IV of the Constitution? The analogy to the Federal Income Tax Act in taxing the income of aliens, which Justice Pitney draws to his support in the Shaffer case is wholly illogical and inapplicable since aliens under the Constitution do not enjoy the same guarantee against discrimination as do citizens of other states. In Paul v. Virginia, 8 Wall. 168, 180, Justice Field declared "it was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned." And in Ward v. Maryland, 12 Wall. 418, Justice Clifford said that this clause of the Constitution "plainly and unmistakably secures and protects the right of a citizen of one state to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Of course we are bound to realize the difficulties of laying an income tax equally upon residents and non-residents alike. The only safe rule, however, is to permit the non-resident to "enjoy" the *same* privileges as a resident, if he wishes to do so, or in the alternative to tax the income of property in the taxing state without reference to income deductions or exemptions allowed to residents in respect to income derivable from sources outside the taxing state which are concededly not taxable.

NOTES OF IMPORTANT DECISIONS.

THE RIGHT TO ENFORCE AGREEMENTS TESTAMENTARY IN CHARACTER.—The idea which appellate courts sometimes have of their duty in rendering a decision seems to be to reach what the court regards as a "just result" without regard to the logical application of legal principles or controlling precedents. This criticism we believe can be justly made of the Supreme Court of Iowa for its decision in the recent case of Fleming v. Fleming, 174 N. W. Rep. 946, where the court holds that a contract between four brothers to enter into a business relation and to invest the profits of the business in property to be held by them jointly and providing that on the death of any of them the entire property shall belong to the survivors, does not deprive a wife of one of the deceased brothers of her distributive share in the property thus accumulated. While we believe that under the law and the evidence the Court in this case reached a wrong result, our main criticism is of the unscientific approach of the Court to a consideration of the points involved in the case and of its discoursive and academic discussion of principles having no bearing upon the problem involved. The following was the contract which the Court was called upon to construe:

"Know all men by these presents that we, Robert J. Fleming, Charles Fleming, John A. Fleming, and Stanhope Fleming, of the city of Des Moines, State of Iowa, in order to provide for the future uninterrupted prosecution of the business of life insurance in which we are now or may be hereafter engaged and mutually associated, and to fix and determine the interests of each therein, hereby mutually agree, and bind ourselves, our heirs, executors, administrators or survivors and all other persons, that, each of the parties to this stipulation and agreement, shall have only such share of, and interest in the profits, earnings and income of the business of life insurance in which we are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto, at any time while we, the undersigned, shall be associated together in said business or thereafter. Upon the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine and at no time shall any accounting be made or required to be made by any party hereto, his representatives, executors, heirs or survivors, or any other person claiming under him, or to any person, officer or representative, upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise. And it is distinctly understood and agreed between the parties hereto that they, nor any of them have, or can have any property rights, or money interests in said business other than that herein specified and defined, and any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business."

When one of the brothers died, his widow demanded her distributive share in the moiety of the real estate that had been accumulated which she contended belonged to her deceased husband. The Court at first approached the subject on the theory that a joint tenancy had been created. After an academic review of the history of joint tenancies and the hostile attitude of courts and legislatures to this form of interest in real property the opinion properly concludes that this contract did not create a joint tenancy. There can be no doubt that no estate in joint tenancy was created since no property was conveyed nor at the time of the agreement did any of the parties own any property. A joint tenancy can only be created by a conveyance in *praesenti* in which must be present the four unities of interest, time, title and possession.

The Court then comes to the conclusion that a partnership was entered into by the four brothers. Whether this was true or not was immaterial but even on this theory the Court was in error in regarding the heirs of a partner as entitled to any interest in the real estate belonging to the partnership. Under the most favorable decisions, the heirs of a partner are only entitled to the share of a partner ancestor in the proceeds after an accounting and by the rule of equitable conversion, in some states, such proceeds (usually cash) will be regarded as realty in the proportion that such assets are the result of the sale of real property belonging to the partnership.

The Court then undertakes to make an emotional appeal in behalf of a wife so cruelly deprived of her interest in her husband's estate by such a contract. "Under our law," says the Court, "the wife, the weaker vessel, the one who maintains the home and rears the children, is entitled to have provision made for her, if peradventure, death robs her of the one legally and morally pledged to support and maintain her. She is entitled to share in such of his estate as by his efforts he accumulates and leaves at his death. The husband cannot take this from her by any testamentary disposition. He cannot contract with her for its release. In view of the legal status of the wife, in view of the relationship which she sustains to her husband, in view of those provisions of statute that protect and guard her interest during his life and after he is dead, it would seem to be

against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death, their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is *a clear fraud on the marital rights of the wife.* Many a wife has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years that something might be left for declining years, must be left penniless."

This appeal by the Court touches our sympathy but has no place in a serious consideration of the legal rights created by the contract herein involved. Here there *was* no property of the husband sought to be conveyed for the purpose of defeating the wife's interest. The contract referred to property *to be acquired* as a result of the labors of four men who agree with each other as to the interest each should have in the property thus to be accumulated in the future. We know of no rule of public policy which restricts contracting parties from defining their interests to property which may or may not come into existence in the future. In some forms of insurance contracts many of the policy holders are by the terms of their mutual contracts entitled to certain additional rights by virtue of the fact of survivorship. These benefits accrue in the nature of increased dividends. In certain forms of tontine policies rights accrue only on the basis of survivorship and at the expense of those who die before a certain time.

The fact that survivorship is no longer regarded as an incident of joint tenancy does not make invalid contracts definitely, providing that future rights of the contracting parties shall be based on the fact of survivorship. In 17 Am. & Eng. Ency. of Law, p. 650, it is said:

"Although the right of survivorship as an incident to joint tenancies be abolished by statute, it may nevertheless be given by will or deed, either expressly or by necessary implication. Nor does such a statute prohibit contracts making the rights of the parties dependent upon survivorship." See also Taylor v. Smith, 116 N. Car. 531; Pritchard v. Walker, 22 Ill., App. 286; Jones v. Cable, 114 Pa. St. 586.

The real objection to this contract which the Court might have pressed with more vigor than it did, was that it amounted to a testamentary disposition of property by deed *inter vivos.* But even if this contract were construed as a testamentary disposition of the property of plaintiff's husband, it would not for that reason necessarily have been invalid for such a contract, in equity, if made for a valuable consideration fully performed on the part of the other contracting party is valid. Take the familiar case of an agreement to devise all one's property to one who agrees to take care of the deceased during his last illness. Such a contract if performed on the part of the one agreeing to render the services will be enforced in equity and a will made in pursuance of such a contract is "irrevocable," according to Mr. Schouler. Schouler on Wills (5th Ed.) Vol. 1, Secs. 452, 453, citing many cases. So, even regarding this contract as being in the nature of a testamentary disposition, there can be no objection to an agreement providing that after one's death his property shall belong to the other contracting party. The property under the contract was the product of the labor of the other contracting parties who may have conceivably entered into it and contributed the labor of a life time only on the theory that they would be entitled to the share of the others. A contract is void as a testamentary disposition only when it is in the nature of a gift, not where it is the consideration for services or property received by the party so disposing of his property after death.

But it seems to us that this contract should properly be regarded as a contract defining the interest of the parties in property to be accumulated in the future and we know of no rule of law which prevents parties from defining their respective interests in property thus to be acquired or produced by their joint efforts. In thus defining their interests in such property they may properly provide that their several interests shall be for life with the fee contingently in the survivor. Under the contract in the present case it was specifically provided that none of the parties thereto had any "property rights" in the property "other than that herein specified and defined." It is, therefore, an improper interference with the right of contract for a Court to take the property contributed and accumulated by the other contracting parties and give it to those who have no right to it under the contract and thus deprive the other parties to the contract of the promised reward after they had fully performed the contract on their part.

It is in keeping with the superficial character of the Iowa Court's consideration of the problem involved in this case that they should fail to have observed the application of a contrary principle, announced by them just six months before in the case of Stewart v. Todd,

173 N. W. 619. In that case a husband and wife entered into a contract to conduct a business as a partnership in which certain provisions were practically identical with the case at bar. In this contract the parties provided that "all the property accumulated, purchased, and owned by either party to be in the firm name. Both parties to use any money they need, and at the death of either party the one living shall fulfill all contracts, pay all debts, and have all property left or owned by either party, or in the firm name."

The contract in the Stewart case was clearly a testamentary disposition, but the Court upheld the contract in favor of the surviving husband as against the wife's will which attempted to devise her share of the property, which was largely real estate, to certain of her relatives. In this case the Court properly ignored the question whether a partnership had been created for the obvious reason, as the Court states, that the rights of the parties do not arise out of the partnership relation but out of the specific provisions of the contract into which they entered, which provided that property to be accumulated by their joint efforts should belong to them as partners while they lived and go to the survivor on the death of either. In answer to the objection that such a contract was an attempt to make mutual wills, the Court said:

"It is true that as a testamentary instrument it cannot be enforced, but an agreement to leave property to another, resting upon a consideration, is valid and binding, and will be enforced by the courts."

In Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528, the same result was reached. In this case the Court held that:

"Where husband and wife bind themselves to make a particular disposition of their property by will, and such contract is fully performed on the part of the husband, and the benefits received and accepted by the wife, equity will prevent the wife from violating her part of the contract in fraud of parties interested, and that, if a conveyance is made by her after the death of her husband in violation of her agreement, the conveyance may be set aside at the suit of the parties for whose benefit the agreement was made. See, also Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802."

RESTRICTIONS UPON RESALE OF AN ARTICLE TO PREVENT PRICE CUTTING.—There have been many decisions and much argument over the question of the right of a merchant to impose such restrictions upon his vendee as will prevent the latter from selling the article purchased below a price fixed for resale of the article. The subject is also covered by the Sherman and Clayton Acts which have been construed as prohibiting restrictions on resale of patented articles. Boston Store v. American Graphaphone Co., 246 U. S. 8, 38 Sup. Ct. Rep. 257. But all contracts prohibiting price cutting are not against public policy and the distinctions to be observed in this respect are made clear by the Vice Chancellor of New Jersey in the recent case of Ingersoll & Bro. v. Hayne & Co., 108 Atl. Rep. 128.

The complainant, a manufacturer of cheap watches, asked that the defendant be restrained from re-selling complainant's watches known as "Yankee Watches" for less than $1.35 each. The theory of the suit was not that complainant desired to interfere with the property right of the defendant but that he wished to protect his trade name "Yankee Watch." He offered to permit defendant to purchase the identical watch without the name, "Yankee Watch," and sell it for what he wished. The Vice Chancellor in sustaining the defendant's bill said:

"It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this state been as above indicated recognized by statute. Since the opinion of the Supreme Court in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, it has been recognized that the Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. §§ 8820-8823, 8827-8830) and Clayton Act Oct. 15. 1914, c. 323, 38 Stat. 730, must be construed in the light of reason. To say that Congress intended to prohibit an act which had the effect of stimulating interstate commerce and stimulating competition rather than putting a restraint upon either is, I think, to state an absurdity. The proofs before me demonstrate that, if defendant and others are permitted to pursue their practice of price cutting, the business of complainant will be ruined and thereby the volume of interstate trade be reduced, or a method of distribution will have to be adopted which will greatly increase the price to the consumer, which will necessarily result in reducing the volume of interstate traffic; that in either event competition will be effectively reduced."

The Chancellor also called attention to the fact that such a use of the trade-mark of a well known manufacturer is a fraud upon the public. The Court asks why retailers desire to sell a certain trade-marked article at or below cost and answers his own question. "So that retailers," says the Court, "may make

use of the trade-name and good will established after extensive advertising, to the extent that the public have associated with the article a standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut price all other goods sold are similarly low priced; in other words, to defraud the public. It is no answer to say that full value is given by the retailer for each article sold. If such be the fact, a person is defrauded if he buys an article at full price for which he has no immediate need because he is induced to believe it a bargain and thereby deprive himself of the use of the purchase price for other purposes for which he might have used it if he did not think he was getting a bargain."

The Chancellor seeks to distinguish this case from the cases of Boston Store Co. v. American Graphapahone Co., supra, and Dr. Miles Medical Co. v. Park & Sons and others by showing that in these cases the Supreme Court upheld the right of a purchaser to resell the *article* bought but did not hold that he had a right to traffic in the manufacturer's trade-mark. The Court said:

"In the cases which have gone to the Supreme Court of the United States, there have been involved questions of patent or copyright law not here present. In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a resale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against the resale of the article, nor is it impracticable to resell the article without reference to the trade-name. Indeed, complainant offers to manufacture watches similar to those marked with its trade-name without the trade-name. Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. It has an interest, in addition to that of mere protection to its trade-name and good will, for it guarantees the article sold, and scrupulously performs its guaranty, maintaining a large and expensive repair department for this purpose. It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar where the nature of the restraint is not such."

WHICH DEFINITION OF "CONCURRENT POWER" WILL THE SUPREME COURT CHOOSE?

Four distinct constructions of "Concurrent Power" have been presented to the U. S. Supreme Court in the hearing on the seven liquor cases now pending relating to the 18th Amendment. The life of the 18th Amendment hangs upon a proper construction of these two records.

Messrs. Root and Guthrie in claiming that the Federal Prohibition Code cannot be enforced in New Jersey without concurrence by similar state legislation said in their brief:

"In other words, the State was not surrendering to the Federal Government any part of the exclusive control then exercised and exercisable by it over its own internal affairs, nor was the Federal Government surrendering any part of its exclusive control over interestate and foreign commerce, but each was retaining an effective voice within its own sphere of action, and this was accomplished by limiting the grant of authority of each, so far as it might affect the rights of the other, to concurrent power of enforcement."

Mr. Kelly representing the liquor interests of Massachusetts contended that the Federal Code could not go into operation until three-fourths of the states ratified it by enacting similar legislation. His brief says:

"The only method of legislation authorized by the Constitution of the United States by which the power of the several States over intoxicating liquor can be destroyed or surrendered is legislation enacted by the concurrent power of congress and the several States as authorized by Article 5 of the Constitution."

Mr. Jackman representing the brewing interests of Milwaukee, claims that the State has supreme power over the liquor traffic within its borders. He said:

"Congress and the Respective States are granted concurrent power to enforce the prohibition. The state of Wisconsin, having under the power reserved by and granted to it by the Eighteenth Amendment, enacted legislation to enforce the pro-

hibition contained in such amendment and not having concurred in the congressional legislation, congress is without power to enforce its legislation as to strictly intra state transaction and override the state enactment."

If any of the above definitions are adopted by the court, beer containing 2¾ per cent alcohol may be sold in the states that do not prohibit it, or fail to concur in the act of Congress which fixes the standard at one-half of one per cent.

Concurrent Power as Defined by the Defenders of the 18th Amendment.—The Justice Department of the United States construed "Concurrent Power" in their brief as follows:

"There is an express purpose, of course, that Congress shall have power to legislate for the enforcement of the amendment. The only qualification or limitation of the power so conferred is that, instead of being exclusive, it shall be concurrent with a like power in the several States. It is not required that there shall be joint action by Congress and the States, or that the legislation enacted by the one shall be concurred in by the other." * * *

It is to be noted that section II does not say that legislation shall be concurrent, but that the concurrent power to legislate shall exist. The concurrent power of the States and Congress to legislate is nothing new.

It is respectfully submitted that the validity of the Volstead Act does not depend in any sense upon whether it has been concurred in by the State of New Jersey or not."

Mr. Charles E. Hughes, former Justice of the Supreme Court, construed "Concurrent Power" in these words in his brief:

"If the intent had been to provide that the traffic should be prohibited, but that the prohibition should not be enforced in any state except by the law of the State, or with the consent of the State, it is difficult to see why the Amendment should have been made. * * *

"That this prohibition was established by an amendment to the Federal Constitution sufficiently indicates the intention to make the subject to which the prohibition applies a matter of national concern; and, as the prohibition of the manufacture and sale of intoxicating liquors was thus made a matter of national concern, it is impossible to conclude that it was intended that the Nation was to be denied authority to enforce the prohibition, except with the consent of the States. It is equally impossible to suppose that the authority of the Nation should be overriden, in case of conflict between National and state legislation."

Congressman Volstead, Chairman of the Judiciary Committee of the House, gave his opinion in the following words, which was quoted to the Court:

"The amendment cannot be enforced by granting the right to do certain things; it must be enforced by forbidding the things forbidden by the amendment. Any act left unpunished by a state, may, nevertheless, be punished by the National Government if such punishment tends to enforce the amendment, and likewise, to accomplish the same purpose, an act left unpunished by the National Government may be punished by the states."

Congressman Webb, the author of the 18th Amendment, now United States District Judge, expressed his views as follows:

"In other words, if a state, through its law-making body, does not consider it necessary to limit the alcoholic content to one-half of one per cent, but thinks a two and three-quarter per cent sufficient, then, as a matter of course, any person in such state, who manufactured a beverage containing two and three-quarter per cent alcohol would not and could not be punishable by such state authorities for making such beverage, but such person would be liable to indictment by the federal authorities, because he had violated the federal act which limits the alcoholic content to less than one-half of one per cent.

"Some wet states might not pass laws against the manufacture and sale of liquor at all, but their nonaction would certainly not prevent the prosecution of one of their citizens for violating the Volstead Act based upon the constitutional amendment."

Senator Nelson, Chairman of the Judiciary Committee of the Senate, stated it as follows:

"The concurrent legislative power conferred on the states is a power to enforce

and not to destroy or nullify the Amendment or any part of it. The States may pass laws to aid in enforcing the Amendment, but they are utterly without legislative power to in any wise nullify or destroy it."

Either the state or the United States may go as far in prohibiting the beverage traffic as Section II of the Eighteenth Amendment authorizes, but the failure of either to use all of its power does not prevent the other from doing so. When either unit of government does act within the scope of its authority and prohibits the traffic, the other unit cannot license or legalize the traffic within the territory covered by the authorized prohibition act. If the state attempts to override or set aside the valid laws of the United States by enacting license laws permitting the sale of prohibited beverage liquors, they will be of no avail because the vendor must obey the laws of the United States as well as those of the state. Likewise the Congress cannot license the sale of intoxicating liquors in conflict with state laws, because there is no authority to license beverage intoxicants. It might prohibit intoxicants of a greater alcoholic content than is found in the laws of some of the states but this does not prevent the state from enforcing its law. If either the state or the United States should attempt to license the sale of well recognized intoxicants, such acts would be clearly void as in contravention of the Constitution. Either the state or the United States may prohibit liquors not commonly recognized as intoxicants, because it is necessary to do so to secure the enforcement of the law against the recognized intoxicants. The manufacture, sale, transportation, importation and exportation of the traffic in intoxicating liquors is outlawed by the constitution. All laws which are necessary and appropriate to make this prohibition effective and enforceable are clearly authorized.

WAYNE B. WHEELER.
Washington, D. C.

THE EJUSDEM GENERIS PRINCIPLE OF INTERPRETATION.

The recent notable decision by Mr. Justice Sankey to the effect that a proclamation (No. 32) of 1918, enacted under § 43 of the Customs Act of 1876 is illegal, turned essentially on a principle of interpretation of statutes and contracts well known in our law—the *ejusdem generis* rule.

Mr. (now Lord) Justice Scrutton thus explains it: "Where specific words are followed and amplified by the addition of general words, the latter are to be confined in their application to things of the same kind as the preceding specific words." And in further explanation of the principle, he points out that in this connection *ejusdem generis* does not mean "of the same kind," but "of the same genus;" in other words, it is used in its strict logical meaning, and not in a popular sense.

The question always is, whether a particular thing is within the same genus as the enumerated species; the question is not as is sometimes erroneously supposed, whether a particular thing is of a similar kind or like to the things enumerated.

Another point to be noted is that this rule of construction only applies when the whole context and character of the document under consideration show that the general words which follow the specific words are descriptive of one well-marked genus to which these belong as species; otherwise the ordinary rule must obtain that prima facie general words ought to be taken like other words at their face value, and not in any restricted sense.

It is only when some indication exists that the parties to the document intend a restricted meaning that such restriction can be read into it. An analysis of the whole document in order to grasp its general scope, is, therefore, necessary before it can be decided whether or not the rule applies.

These observations will tend to a clearer appreciation of the question Mr. Justice

Sankey had before him. Section 43 of the Customs Act of 1876 provides that "the importation of arms, ammunition, gunpowder, or any other goods may be prohibited be proclamation or order in council." The point was, whether the phrase, "any other goods," means literally what it says, or whether its meaning is qualified by the context, namely, the preceding enumeration of three definite classes of goods.

His Lordship held that it was so qualified. The goods enumerated were obviously of a genus, which, in his opinion, could not include the articles in respect of which the action was brought, namely, six packages of pyrogallic acid. They belonged to the genus "chemicals," not to the genus "utensils of war."

In view of the forthcoming argument in the Court of Appeal, we give a few leading instances of the application of the principle in other directions. In the case of Mudie v. Strick and Co., Limited,[1] the demurrage clause of a charter partly contained the exception of "strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignees." The vessel was delayed through the scarcity of labor arising from the sanitary authorities burning the houses of native coolies to prevent the spread of plague. The consignees endeavored to show that this was a cause beyond their control, and therefore within the exceptions. The Judge held in the first place that it was not an accident. In doing so, he followed the case of Fenwick v. Schmal,[2] in which the defendants, having agreed to load the plaintiff's ship with coal in regular and customary turn, except in case of "riots, strikes, or any other accidents beyond his control," and the loading having been delayed by a snowstorm, it was decided that such a cause of delay was not an accident.

Returning now to Mudie's case, there remained the argument that in any event the consignee was exempted by the general words. These words, in accordance with the principle of *ejusdem generis*, fell to be determined according to the class of circumstances exempted by the preceding particular words. The Court considered that the preceding particulars, "strikes, lockouts and civil commotions," disclosed a particular genus of exceptions, namely, either labor troubles, or disturbances which frightened people from going to their work. This being the genus, did plague fall within it? It was decided that it did not.

A decision which was much discussed in the arguments in Mudie's case was that of the S.S. Knutsford.[3] A time-charter provided that should a port be inaccessible on account of "ice-blockade, or interdict, or should a port be deemed by the master unsafe, in consequence of war or any other cause, he might discharge the cargo for that port at a safe port at the risk of the cargo owners, and on such discharge the ship's responsibility was declared to cease." The Knutsford was chartered to carry goods to Vladivostock, and on arriving off that port she found it inaccessible on account of ice. The captain, after waiting three days, left for Nagasaki, where the cargo was deposited. The charterers sued the shipowners for damages for failure to deliver. The defense was that the captain had deemed the port unsafe on account of ice, and, therefore, the ship was not responsible, because the charter provided that her responsibility should cease if the master deemed a port unsafe in consequence of war, or any other cause. It was held, however, that war and disturbance were things totally different from ice, and that the general words "or any other cause" could only cover matters of the same class as war and disturbance. The shipowners were, accordingly, made liable because ice was not of that genus.

If, it may well be asked, the particulars specified in an exception clause cannot be

(1) 25 T. L. R. 453.
(2) 1868 L. R. 3 C. P. 313.
(3) 13 Com. Ca. 244.

put into one and the same genus, how are they to be read? Sarsen v. Sylvester and Co.[4] is in point. The shipowners sued the charterers for demurrage under a charter-party, which contained an exception of "frosts, floods, strikes, lockouts, disputes between masters and men and any other unavoidable accidents or hindrances of what kind so ever beyond the control of the parties, preventing or delaying the loading." Delay was caused by congestion of shipping at Grimsby Dock. The charterers were held to be excused on the ground that the clause in question evidently showed an intention that the general words should not be restricted to any one genus, but should get their ordinary meaning. Contrast with this the case of In re Richardson and Samuel.[5] There the charter-party provided for loading at Batoum at a certain rate per day, and excepted, *inter alia*, strikes, lockouts, accidents to railways and other causes beyond the charterers' control. The cargo was oil, which was to be loaded at a certain factory. A flood up country damaged the railway which brought down the oil to the factory, and in consequence of this the workmen at the factory were discharged. Subsequently the railway was repaired and oil was sent down, but the discharged workmen could not be got together in sufficient numbers to permit of loading in time. It was held that the delay could not be attributed to accidents to railways, and was not *ejusdem generis*, with strikes and lockouts.

This last mentioned decision is closely analogous in method of interpretation to Mudie v. Strick and Co., but neither of these cases can be reconciled with Sarsen v. Sylvester and Co., where the general words got a wider meaning because the preceding particulars could not be placed in one genus. Now, according to that principle, the particulars in the exception clause in Richardson's case, strikes, lockouts and accidents to railways cannot be placed in one genus, and, therefore, the general words should have received their ordinary meaning, but the Court took the view that unless the general words were limited in some way the preceding particular words were mere surplusage, and, accordingly, they limited them in the way described.

DONALD MACKAY.

Glasgow, Scotland.

(4) 13 Com. Ca.
(5) 1 Q. B. 261.

CRIMINAL LAW—COERCION OF HUSBAND.

KING v. CITY OF OWENSBORO.

(Court of Appeals of Kentucky. Feb. 10, 1920.)

218 S. W. 297.

There is no longer a presumption as at common law that a married woman who commits a crime conjointly with or in the presence of her husband acts under his coercion, since Ky. St. §§ 2127, 2128, providing that wife holds and owns all of her separate estate and may contract, etc., destroys such presumption.

CLAY, C. Edith King, a married woman, was fined $30 by the police court of Owensboro for selling intoxicating liquor without a license. On appeal to the Daviess circuit court she was again found guilty, and her punishment fixed at a fine of $100 and costs. She appeals.

It is first insisted that the court erred in permitting the city to prove the license ordinance by filing a certified copy of only parts thereof. The copy introduced in evidence was certified by the city clerk as a true and correct copy. The record before us shows only those parts of the ordinance relating to liquor licenses. If, as a matter of fact, the certified copy of the ordinance was not complete, the defendant should have objected to its introduction on that ground, but, not having done so, she cannot avail herself of the error of the trial court, if any, in permitting only a partial copy of the ordinance to be introduced in evidence.

It is next insisted that the court erred in authorizing the jury to find the defendant guilty if they believed from the evidence, to the exclusion of a reasonable doubt, that she, without license to do, "either by herself, or by or through any person connected with her, sold any beer to the witness John Walt." It appears that defendant and her husband lived at 112 Madison street, and that the defendant con-

ducted a disorderly house at 120 Madison street, the adjoining residence. The beer was stored in an outhouse. The husband carried the key. He directed the negro to deliver the beer to 120 Madison street. There was evidence to the effect that the defendant herself sold beer to John Walt, and this evidence is uncontradicted. There was also certain evidence that the inmates of the house sold intoxicating liquors and turned over the proceeds to the defendant. While the use of the words "or by or through any person connected with her" were not technically correct, we are not disposed to hold that the error was prejudicial, in view of the fact that the evidence that defendant herself sold beer to the witness Walt was uncontradicted.

Another ground urged for reversal is that the court erred in not giving the jury the whole law of the case; it being insisted that the jury should have been told in substance that, if they believed from the evidence that the defendant acted jointly with her husband in selling the liquor, or sold the liquor in his presence, the law presumed that she acted in obedience to his command and under his coercion, and they should find her not guilty, unless they believed from the evidence that she acted of her free will and volition. It may be conceded that even at the time of Blackstone it had been the rule of the common law for a thousand years that where a crime with some exceptions, was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not criminally liable, as it was presumed that she acted in obedience to his commands or under his coercion. 13 R. C. L. p. 1238. It may also be conceded that the rule has been applied to all classes of misdemeanors, and even within recent years to the illegal sale of intoxicating liquors. Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422; 4 Bl. Com. 28. While it is said that the reason for the rule is not quite clear, it is evident that it must have had its foundation in the peculiar relation which existed between husband and wife in the earlier days. At common law the husband had almost absolute control over the person of his wife; she was in a condition of complete dependence; could not contract in her own name; was bound to obey; she had no will and her legal existence was merged into that of her husband, so that they were termed and regarded as one in law, "the husband being that one." 13 R. C. L. p. 983; Elliott v. Waring, 5 T. B. Mon. 338, 17 Am. Dec. 69; MacKinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 552. But these conditions have changed. Even at an early day courts of equity disregarded the fiction that husband and wife were one, and treated them as separate and distinct persons where it was necessary to protect the rights of the wife. Elliott v. Waring, supra; Winebrinner v. Weisiger, 3 T. B. Mon. 32. Indeed, the early rule that the husband might chastise his wife in moderation was never recognized or enforced in this state. Richardson v. Lawhon, 4 Ky. Law Rep. 998. By the act of March 15, 1894, now sections 2127 and 2128, Kentucky Statutes, the rights and liabilities of husband and wife are materially changed. Under that act, the husband has no estate or interest in his wife's property, but the wife holds and owns all of her estate to separate and exclusive use, and free from the debts, liabilities, or control of her husband. By virtue of that act the wife may make contracts, sue and be sued, collect her rents, and may sell and dispose of her personal property. In the case of Lane v. Bryant, 100 Ky. 138, 37 S. W. 584, 18 Ky. Law Rep. 658, 36 L. R. A. 709, this court declined to follow the common-law rule that a husband was liable for slanderous words spoken by his wife, on the ground that the rule had been changed by the above statute, the court saying:

"The rule is a harsh one at best, and with the progress of civilization, and the changes by wise, modern legislation of the relation between husband and wife as to the right of property and personal control by the husband, it would seem absurd in this enlightened age to regard the wife as a mere machine, made to labor and to talk as the husband directs, and to make him liable on that ground for her torts when not committed by his direction or procurement."

After calling attention to the provisions of the act of March 15, 1894, the court added:

"While it may be and is the marital duty of both to aid each other in the support and maintenance of each and of their children, the control and use of the wife's property by her is independent of the husband, not subject to his control, and the familiar doctrine that the legal existence of the wife is merged in that of the husband no longer exists, and as on this rule is based the common-law liability of the husband for the wife's torts, and even for her debts contracted before marriarge, the reason for enforcing this doctrine is gone, and past adjudications on the subject will not be followed. The unity of person has been destroyed, and to say that it still exists, with the constant legislation of this state endeavoring to secure the wife in her person and property, and at last by the act of March, 1894, making the wife equal of the husband in the control and use of property, would be opposed to the plain legislative intent, and result in enforcing a doctrine that has neither wisdom nor justice in it."

In the more recent case of Turner v. Heavrin, 182 Ky. 65, 206 S. W. 23, the court, while recognizing the common-law rule that a wife

could not sue for criminal conversation with her husband, held that the rule had been changed by the act of 1894, and that a wife now had the right to bring such an action.

It will thus be seen that the one-person idea of the marriage relation as expounded by the common-law authorities, can no longer be made the touchstone of a married woman's rights or capacities. Nagle v. Tieperman, 74 Kan. 32, 85 Pac. 941, 88 Pac. 969, 9 L. R. A. (N. S.) 674, 10 Ann. Cas. 977. Being secure in her person and property, and her separate identity having been established, it is clear that the means through which a husband exercised control and dominion over the person and property of his wife no longer exist. Having sought and obtained these new rights and privileges, which have placed her upon a plane of equality with her husband, she must accept the corresponding obligations and responsibilities which those rights and privileges entail, and can no longer take shelter under the supposed dominion of her husband. This is the view taken by the Supreme Court of Tennessee in the case of Morton v. State, 141 Tenn. 357, 209 S. W. 644, 4 A. L. R. 264, where it was held that the supposed duress of a woman by reason of marriage, which relieves her of liability for crimes committed in the presence of her husband, depends upon her disability by virtue of the marriage, and is destroyed by statutes emancipating her from such disability. We therefore conclude that there is no longer a presumption that a married woman who commits a crime conjointly with or in the presence of her husband acts under his coercion. It follows that the court's failure to instruct the jury to that effect was not error.

Judgment affirmed.

NOTE—*Coverture as Defense in Criminal Acts.*—In many of the States it has been held, as under the rule of common law, that if a husband is present when a crime is committed by his wife presumably she acts under his coercion, but this presumption, in this country at least, is remittable.

Thus in Com. v. Adams, 186 Mass. 101, 71 N. E. 78, Loring, J., said it was recited that in that state "When a married woman is indicted for a crime and it is contended in defense that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion or whether she acted of her own free will and independently of any coercion or control by him."

And much earlier than this it was held in Uhl v. Com., 6 Grat. (Va.) 706, that an instruction to the jury, leaving it to them to say whether the wife was coerced or acted under her own free will, was right.

In People v. Ryland, 97 N. Y. 126, it was left to the jury to say whether a wife was guilty or not of forgery, where there was no direct evidence that she acted under the influence of her husband or that he compelled her in any way to participate in the crime.

In State v. Houston, 29 S. C. 108, 6 S. E. 943, it was said that as matter of law a wife could not be deemed guilty where after being coerced in giving assistance, she became the more active of the two in consummating the offense, as the influence of former coercion might still be the reason for her activity.

But the rule seems a little different where the crime charged involves conspiracy and the common law rule that husband and wife, being one person in the law, they cannot be joined as conspirators. Several states have held that general emancipation under married women acts do not abrogate this rule.

Thus in People v. Miller, 82 Cal. 107, 22 Pac. 934, on an appeal by the husband, his sole contention was that no prosecution for conspiracy could be maintained against husband and wife and the Court said: "That such was the rule of common law, we cannot doubt, and we find nothing in the code or statutes of this state to indicate an intention by the legislature to change it."

In State v. Clark, 9 Houst. 536, the Court charged the jury that: "A husband and wife may together commit a crime as well as either one alone—they may combine together and commit a murder; if they are both engaged in this transaction, though the law regards them as one they are alike guilty," but then the Court goes on to say: "It is true that, if those two alone were concerned in the commission of an offense of this kind, then you could not convict, because it takes two to make a conspiracy—they being one in law; but it would be sufficient if there were other persons joined in it, though they were not known; then they might be convicted." This appears to us to be excessive refining.

In Merrill v. Marshall, 113 Ill., App. 447, the action was for slander in charging that plaintiff "and her husband formed a conspiracy to cheat and defraud" a certain company, and therefore it was ruled that there was no imputation for which an action was maintainable, because the common law so far as applicable and of a general nature is the law of this state, and this has not been modified. At all events, it looks like enforcing a technical rule quite strictly to apply it in such a case.

Whether the enabling acts and other statutes make inapplicable such a rule as we have been discussing, is a thing as to which we grow more dubious every day. But it is difficult to say we have advanced or are advancing to the point, where man and wife will stand in every way the same as regards the family relation. Not yet does it seem to be recognized that the man is displaced as the head of the family, nor do we think it will be the case, when not only as to property rights they are equal, but also as to general political rights. Where woman is declared to be a *feme sole* for certain purposes, the rule of construction is that of strictness and nothing to aid it is implied. The reasons we have cited still give us a glimpse of the old rule, as they impliedly admit that coercion by a husband might be less injurious than by a stranger.

C.

CORRESPONDENCE.

RIGHT OF WOMEN TO SERVE AS JURORS.

Sheboygan, Wis., March 20, 1920.

Central Law Journal,
St. Louis, Mo.

Gentlemen:

It is with great interest that I read the article in your issue of March 19th, having reference to the rights of women to be drawn for jury service and agree with all that is said. What, however, has not been touched is the fact that the jury to which all constitutions refer in the provisions for right of trial by jury has been decided to be the common law jury known at the time of the adoption of the United States Constitution, which is a jury of *twelve men* and whose verdict must be *unanimous*. It seems to me that no constitutional amendment giving the right to vote to women unless further amendments were adopted changing the constitution as to what kind of a jury such constitutions refer to could give the right to a Court to draw women for jury service, anymore than any law could be constitutionally enacted to reduce the number of men on a jury or to provide for a verdict other than unanimous.

Respectfully yours,

PAUL T. KREZ.

Sheboygan, Wis.

BOOKS RECEIVED.

American Digest, Annotated. Key Number Series, Volume 7A. Continuing the Century Digest and the first and second Decennial Digests. A Digest of all current decisions of all the American Courts, as reported in the National Reporter System, the Official Reports, and elsewhere, from January 1, 1919, to May 31, 1919; and digested in the Monthly Advance Sheets for February, 1919, to and including June, 1919 (Nos. 341-345). Prepared and edited by the Editorial Staff of the American Digest System. St. Paul. West Publishing Company. 1920. Review will follow.

American Law of Charter Parties and Ocean Bills of Lading. By Wharton Poor, of the New York Bar. Albany, N. Y. Matthew Bender & Company. 1920. Price, $5.50. Review will follow.

HUMOR OF THE LAW.

Joe Fountain of Bootjack, Mich., was willing to plead guilty in court to the charge of making liquor, having a private still in his home. Prosecuting Attorney Lucas told the court that he tried to get a promise of reformation from Joe, a promise at least that he would refrain from drinking for the remainder of his life.

"Not me," was Joe's answer. "It might go wet again."

As Joe's infraction included only making a little spirit for his own use, he was released on payment of the costs.—*Daily Mining Gazette.*

Some eons ago, in my youth's early hey-dey
I used to sit up until midnight to read
A method of getting more money on pay day
In a book that was called "Seven Ways to Succeed."
"That man," I observed, "is a sevenfold wonder,
He's learned all the tricks and the kinks in the game.
A person so wise couldn't know how to blunder;
By now he must be on the top peak of fame."
But I found later on that the gifted old bloke
Had died in the workhouse, disheartened and broke.

Men thought that McCoyne was a whale,
He had soaring Sierras of pelf,
And all of these mountains of kale
McCoyne had piled up by himself.
But when they had published the will
The people were startled to see
That a dumb little dame in the chorus girl game
Was named as his sole legatee!

As long as a man is alive
He can cling to the bubble called fame,
His great reputation will thrive
And people will honor his name.
But nine out of every ten
Their robes of distinction will shed,
For folks find them out when their wills get about,
A month or two after they're dead.

When Jones was a king of finance
His countrymen reverenced Jones;
They thought that there wasn't a chance
That he ever would pull any bones.
But when they discovered his will
His dollars were left—every one—
To a red-headed peach who began every speech
"I'll say so," "I seen" or "I done."

—*Post-Dispatch.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy**—Appeal and Error.—A decree of adjudication is a final decree, and, if unappealed from, is binding, not only on the bankrupt, but upon the petitioning creditors and all other creditors who became parties to the proceeding and interested in the estate, which is res in the hands of the Court.—In re Malkan, U. S. C. C. A., 261 Fed. 894.

2.——Constitutional Law.—Congress can constitutionally enact that a discharge in bankruptcy shall bar debts due to creditors residing out of the country, so far as future proceedings within the country are concerned.—Morency v. Landry, N. H., 108 Atl. 855.

3.——Preference.—Where real estate was conveyed to a partnership, on its organization, by one of the partners, with the knowledge of his partner that he had previously given a mortgage thereon, the fact that through his failure to record his own deed the mortgage did not become eligible to registry, so as to become a lien, until within four months prior to the firm's bankruptcy, when it was recorded, in the absence of evidence that the firm was then insolvent, the mortgage could not constitute a voidable preference, void under Bankruptcy Act. In re Sola e Hijo, S. en C., U. S. C. C. A., 261 Fed. 822.

4. **Banks and Banking**—Evidence. — Where plaintiff, believing there was but one mortgage on land, asked defendant bank to buy for plaintiff the vendor's interest in a contract of sale thereof, and to procure an assignment reciting that the sale was subject to but one mortgage, defendant, knowing there was a second mortgage, was liable for buying such interest without procuring such assignment.—Troutman v. Gates, Minn., 176 N. W. 187.

5.——Implied Warranty.—Where the books of a bank are shown to a prospective purchaser of bank stock, and nothing is said with reference to the correctness of the books, there is an implied warranty that the books are correct, but where there is an express refusal on the part of the seller to warrant the correctness of the books, there is no implied warranty.—Luten v. Earles, Wash., 187 Pac. 349.

6.——Misapplication.—The issuing by an officer of a national bank, without consideration, of certificates of deposit which are afterward paid by the bank, constitutes a misapplication of its moneys, funds, and credits, within Rev. St. § 5209 (Comp. St. § 9772).—Matters v. U. S., U. S. C. C. A., 261 Fed. 826.

7. **Bills and Notes**—Acceptance.—Payment by bank of a check drawn on it includes acceptance. —National Bank of Commerce of Seattle v. Seattle Nat. Bank, Wash., 187 Pac. 342.

8.——Drawee.—The drawer of a check undertakes that the drawee will be found at the place that he is described to be, and that the sum specified will there be paid to the holder when the check is presented, and he is bound to pay at the place named.—Raphael v. People's Bank of Benicia, Cal., 187 Pac. 53.

9.——Postdated Check.—A postdated check may be transferred before the day it bears date with like effect as if transferred on the day of its date.—American Nat. Bank v. Wheeler, Cal., 187 Pac. 128.

10. **Cancellation of Instruments**—Inadequacy. —Where the inadequacy of consideration for an instrument affecting real estate is accompanied by other inequitable incidents and shows bad faith, such as concealment, misrepresentation, and undue advantage on part of the one obtaining the benefit, or the ignorance, weakness of mind, incapacity, pecuniary necessities, and the like on the part of the other, such circumstances, together with the inadequacy, will much more readily induce a Court to grant relief, defensive or affirmative.—Brink v. Canfield, Okla., 187 Pac. 223.

11. **Carriers of Goods**—Bill of Lading.—Person discounting draft attached to bill of lading requires special property in shipment.—Frontier Nat. Bank of Eastport v. Salinger, Ind., 126 N. E. 40.

12. **Carriers of Passengers**—Derailment.—A common carrier is responsible for defects in a rail causing derailment injuring a passenger which, even though not discoverable after the rail came into its possession, could have been discovered by the most careful and thorough examination during manufacture.—Morgan v. Southern Pacific Co., Cal., 187 Pac. 74.

13. **Commerce**—Telegram.—Where there was continuous transmission of a telegraph message from a place in Mississippi to a place in Texas, the message was interstate commerce.—Mackey Telegraph & Cable Co. v. Martin, Tex., 218 S. W. 133.

14. **Compromise and Settlement**—Amicable Adjustment—It is the policy of the law to encurage rather than discourage amicable adjustments of controversies, and while it frowns upon imposition and fraud in the procurement thereof and will protect the victimized therefrom, it will not relieve from merely improvident settlements.—Kessler v. Leinss, Wis., 176 N. W. 236.

15. **Contracts**—Implication.—A duty may be imposed upon a party to a contract by necessary implication, and, when such implication is not external to the contract but gathered from it, it is as much a part of the contract as if set forth in express words.—Ambrosini v. N. Pelaggie & Co., Vt., 108 Atl. 916.

16.——Intent.—Where a contract is ambiguous, the true intention of the parties, if it can be ascertained therefrom, prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulation.—Prowant v. Sealy, Okla., 187 Pac. 235.

17.——Option.—Where, in a contract supported by a sufficient consideration, an option is given to one of the parties, the option is valid and enforceable, though there is no independent or specific consideration therefor.—Blaffer & Farish v. Gulf Pipe Line Co., Tex., 218 S. W. 89.

18.——Quantum Meruit.—Plaintiff suing on a special contract for compensation as a shorthand reporter, having set up such a contract and offered evidence thereof, could obtain no relief on a quantum meruit.—Reitler v. Olson, Colo., 187 Pac. 313.

19. **Corporations** — Apparent Authority.—The president of an oil-producing company, with authority to superintend drilling operations upon certain property, did not have apparent authority to enter into brokerage contract on behalf of the corporation, engaging brokers to sell such property.—Caddy Oil Co. v. Sommer, Ky., 218 S. W. 288.

20.——Change of Name.—A change of corporate name does not make a new corporation, but only gives the corporation a new name.—W. T. Rawleigh Medical Co. v. Bunning, Neb., 176 N. W. 85.

21.——Misuse of Franchise.—Misuse of a corporate franchise constitutes abuse of powers, justifying the application of Comp. Laws 1913, § 8004, for the annulment of corporate franchises for abuse of power, whenever the acts of misuse involve injury to the public, although the same acts may be a violation of a penal statute, as Pen. Code, c. 65.—State v. Gamble-Robinson Fruit Co., N. D., 176 N. W. 103.

22.——Personal Act.—Authority of the president of a corporation to draw checks in the name of the corporation for his individual benefit cannot be presumed.—McCullam v. Mermod, Jaccard & King Jewelry Co., Mo., 218 S. W. 345.

23.——Ratification.—Ratification by corporation of unauthorized contract made the contract that of the corporation from its inception.—Union Oil Co. of California v. Pacific Surety Co., Cal., 187 Pac. 14.

24.——Ultra Vires.—An "ultra vires" act is an act beyond the powers of the corporation.—Houston v. Utah Lake Land, Water & Power Co., Utah, 187 Pac. 174.

25. **Covenants**—Building Restrictions.—That property subject to restrictive covenants has become more desirable or valuable for business than for residence purposes will not necessarily defat equitable relief, where the restriction, notwithstanding the change of conditions, is still of substantial advantage to the dominant property.—Strong v. Shalto, Cal., 187 Pac. 159.

26.——Restriction Scheme.—Restrictive covenants inserted in deeds as part of a building scheme and expressly made binding on every lot in the tract for the benefit of every owner run with the land for the benefit of other lots in the tract.—Miles v. Hollingsworth, Cal., 187 Pac. 167.

27. **Criminal Law**—Bribery.—An attempt by defendant to bribe an adverse witness was evidence of guilt and might be so considered by the jury.—State v. Ettenburg, Minn., 176 N. W. 171.

28.——Intrapping.—A person intrapped into the commission of a wrongful act, without any original criminal design upon his part and without any attempt to carry out a criminal purpose of his own conception, does not thereby become guilty of crime.—State v. Mantis, Idaho, 187 Pac. 268.

29.——Withdrawal of Plea.—After sentence, courts may, in their discretion, permit pleas of guilty to be withdrawn, or refuse to allow such withdrawal, and, except where there has been an abuse of such discretion, the Supreme Court will not interfere.—Sandlovich v. State, Neb., 176 N. W. 81.

30. **Damages**—Mental Anguish.—Mental anguish of plaintiff farmer, injured in the middle of the harvest season, when defendant's automobile collided with his buggy, is one of the consequential results of the injury, which need not be specially pleaded under rule as to pleading special damages.—Freiburg v. Israel, Cal., 187 Pac. 130.

31.——Minimizing.—The rule that an injured person must exercise reasonable precaution to keep down the damages does not require him to submit to an operation.—Gibbs v. Almstrom, Minn., 176 N. W. 173.

32. **Dedication**—Purpose of.—When land is taken or dedicated for use as a highway the taking or dedication should be presumed to be not merely for purposes and usages known and in vogue at the time, but also for all public purposes, present and prospective, known or unknown, consistent with the character of such highway, and not detrimental to abutting realty.—Dakota Central Telephone Co. v. Spink County Power Co., S. D., 176 N. W. 143.

33. **Divorce**—Acquiescence.—Where a husband whose wife had deserted him in 1912 filed and served upon her in 1913 a libel for divorce charging cruelty, he thereby acquiesced in the desertion, and cannot subsequently, on libel filed in 1918, secure divorce as for a three-year utter desertion under Public Laws 1883, c. 212, in the absence of a showing of restoration of continuity of desertion broken by such acquiescence.—Moody v. Moody, Me., 108 Atl. 849.

34.——Alimony.—Alimony on decree for limited divorce need not be in gross.—Goldberg v. Goldberg, Ind., 126 N. E. 36.

35.——Desertion.—Desertion by one consort of the other can only be justified by showing such conduct on the part of the deserted party as would entitle the other to a divorce a mensa, and nothing short of this will justify a willful desertion or a continuance of it.—Towson v. Towson, Va., 102 S. E. 48.

36.——Paramount Right.—The interest of a child of divorced parents is paramount to any right of his father to his custody.—Ladd v. Ladd, Iowa, 176 N. W. 211.

37.——Public Interest.—Marriage is a relation in which the public is deeply interested, and it is subject to proper regulation and control by the state, and cannot be dissolved as an ordinary contract at the desire of the parties.—Bounds v. Bounds, Md., 108 Atl. 870.

38. **Easements**—Private Way.—Open, continuous, and notorious use by an owner of land of a private way over another's adjoining tract, known, acquiesced in, and unprotested by the latter, is presumptively adverse to him, and enjoyed under a bona fide claim of right.—Roberts v. Ward, W. Va., 102 S. E. 96.

39. **Eminent Domain**—Incidental Inconvenience.—The mere incidental inconvenience to an abutting property owner from the construction of a railroad along a public highway, or a consequential injury or a remote injury such as that suffered by the community in general, is not an element of damages for the jury in a

condemnation proceeding in which part of an abutting owner's lot is taken.—Oil Fields & S. F. Ry. Co. v. Treese Cotton Co., Okla., 187 Pac. 201.

40. **Executors and Administrators**—Consideration.—A written instrument, assuming debt of a female servant, on consideration of faithful services and "other valuable considerations," supported by affidavit of correctness on filing instrument as claim against estate of promisor, cannot be defeated on theory of want of consideration, decedent having a perfect right to direct disposition of his estate.—Brickell v. Hendricks, Miss., 83 So. 609.

41.——Estoppel.—An executor or administrator by his acts or omission may raise an estoppel against the estate.—Baber v. Houston Nat. Exch. Bank, Tex., 218 S. W. 156.

42. **Explosives**—Failure to Guard.—Leaving dynamite caps exposed and unguarded in an open drainage dipper near a public highway, where many persons were liable to pass, justified a jury finding of negligence.—Erickson v. W. J. Gleason & Co., Minn., 176 N. W. 199.

43. **Fraud**—Reliance.—One making false assertions or representations as to the character of land, which are unqualified and without reservation, and of a character to induce reliance thereon, is liable, though acting in good faith. —Perkins v. Orfield, Minn., 176 N. W. 157.

44. **Frauds, Statute of**—Party Wall.—Where an oral agreement between adjoining owners that one of them might build a party wall on the division line and own the whole wall until the other paid one-half of the cost had been fully executed by the parties building the wall, and they were in possession as owners, equity would recognize and protect their rights, though the agreement was within the statute of frauds. —Hanson v. Beaulieu, Minn., 176 N. W. 178.

45. **Gifts**—Condition.—That donor, in making gift of money with intent that it should be an absolute gift, required the donee to pay her interest on the sum given during her lifetime, or even give her back some of the principal if desired, did not affect the validity of the gift. —Gould v. Van Horne, Cal., 187 Pac. 35.

46.——Fiduciary Relation.—One who occupied a fiduciary relation to the donor and was in control of the donor's property has the burden of showing that a gift was free and voluntary. —Giltz v. O'Malley, Md., 108 Atl. 878.

47. **Good Will**—Stockholder.—A stockholder in a corporation has no interest in the good will of the corporation which he can sell.—Wylie v. Wylie Permanent Camping Co., Mont., 187 Pac. 279.

48. **Husband and Wife**—Coercion by Husband. —There is no longer a presumption as at common law that a married woman who commits a crime conjointly with or in the presence of her husband acts under his corercion, since Ky. St. §§ 2127, 2128, providing that wife holds and owns all of her separate estate and may contract, etc., destroy such presumption.—King v. City of Owensboro, Ky., 218 S. W. 297.

49.——Estoppel.—A wife who allows her husband to use her property for a long time as his own land will not be allowed to claim it as against his creditors.—Irwin v. Dugger, Ark., 218 S. W. 177.

50. **Indictment and Information**—Signing by Stamp.—Attachment of prosecutor's name to affidavit by rubber stamp sufficient.—Zoller v. State, Ind., 126 N. E. 1.

51. **Injunction**—Irreparable Injury.—A Court of equity will not interfere to enjoin an owner of lands from exercising his lawful rights as owner, nor from doing that which admittedly is wrong, unless it is first shown that the wrong has been threatened, and that it is his intent to carry the threat into effect, to the irreparable injury of complainant.—Mumford v. Rock Springs Grazing Ass'n, U. S. C. C. A., 261 Fed. 842.

52. **Insurance** — Assignment. — Ordinarily, where an insured assigns a life policy for benefit of creditors without any consideration passing at the time, the assignment will be regarded as security only, and upon payment of the debts insured is entitled to a return of the policy or its remaining proceds.—Landrum v. Landrum's Adm'x, Ky., 218 S. W. 274.

53.——Mortgagee.—Where a mortgagee insures his own interest at his own expense, payment of a loss before the mortgage is paid is not a payment on the mortgage, and, conversely, a mortgagor, insuring his separate interest, is entitled to the insurance proceeds, but, where the mortgagor effects insurance payable to the mortgagee as his interest may appear, the policy is for the benefit of both parties.— Sisk v. Rapuano, Conn., 108 Atl. 858.

54. **Interest**—Damages for Breach.—While interest will, in absence of contract therefor, be allowed after maturity for an obligation to pay money, it is so allowed for damages for the breach of the obligation, while interest before maturity rests solely upon contract, and can never be collected, unless the obligor has contracted to pay the same.—Lines v. Potter, S. D., 176 N. W. 150.

55. **Intoxicating Liquors**—Unlawful Possession.—Mere possession not made unlawful by statutes.—Reed v. State, Ind., 126 N. E. 6.

56. **Joint Adventures**—Partnership.—An arrangement, whereby plaintiff was to purchase timber lands as defendant's agent, and the profits and losses were to be shared, was more nearly a joint adventure than a partnership, where plaintiff could not bind defendant to any purchase or sale without defendant's authority in each specific transaction.—Donahue v. Haskamp, Wash., 187 Pac. 346.

57. **Judgment**—Conclusiveness.—A judgment that is not in rem is never conclusive except upon the very matter in judgment and between the same parties or their privies, either in blood or estate.—Kimball v. New York Life Ins. Co., Vt., 108 Atl. 921.

58. **Landlord and Tenant**—Abandonment.— Where tenants paid rent up to the time they abandoned their contract, the abandonment sufficiently terminated the lease without giving 30 days' notice.—Lee v. Sumter Pine & Cypress Co., S. C., 102 S. E. 2.

59.——Assignment of Lease. No assignee of a lease or subtenant can be heard to say that he was ignorant of the terms on which the lessee held possession.—Smith v. Roberts, Tex., 218 S. W. 27.

60.——Eviction.—There was no eviction of tenant under a lease providing he might carry on a general retail liquor business, a permissive rather than a restrictive provision, by an ordinance of the city rendering it impossible for the tenant to conduct a liquor business; he not being restricted in the use of the premises for other businesses.—Security Trust & Savings Bank v. Claussen, Cal., 187 Pac. 140.

67.——Termination of Tenancy.—In order to terminate a tenancy from year to year the law only requires reasonable notice. — Robison v. Barton, S. C., 102 S. E. 16.

62.——Undisclosed Principal.—Where agent who did not have authority in writing as required by Rev. St. 1909, §§ 2781-2783, leased realty of his undisclosed principals for a term greater than one year, the contract was not void, but created an estate at will, which by reason of entry and payment of rental by the month made a valid lease from month to month, binding upon the principals.—Kreppelt v. Greer, Mo., 218 S. W. 354.

63. **Libel and Slander**—Printed Defamation.— Defamatory matter printed and published may be per se actionable, while the same matter orally published would not be so.—Baker v. Clark, Ky., 218 S. W. 280.

64. **Limitation of Actions**—Tolling Statute.— Payment of interest after running of limitations removes bar.—Spencer v. McCune, Ind., 126 N. E. 30.

65. **Malicious Prosecution**—Malice.—Out of the commencement and prosecution of a causeless action by one person against another, the presumption of malice may arise from proof of the fact of a want of probable cause for the institution of such action.—Black v. Knight, Cal., 187 Pac. 89.

66.——Probable Cause.—Want of probable cause cannot be inferred from malice.—Cammander v. Provident Relief Ass'n, Va., 102 S. E. 89.

67. **Mandamus** — Administrative Body.—Will not lie to usurp functions vested in adminis-

trative bodies.—Luginbuhl v. State, Ohio, 126 N. E. 71.

68.——Inspection by Stockholder.—Remedy not afforded stockholder desiring access to books except in case of serious prejudice by denial.—Shea v. Parker, Mass., 126 N. E. 47.

69. **Master and Servant**—Assumption of Risk.—Where there is no negligence on the part of the master, assumption of risk has no place in the case.—Southern Pac. Co. v. Stevenson, Tex., 218 S. W. 151.

70.——Malicious Acts.—A master is liable for the wanton or malicious acts of his servant if committed when the servant is acting in the execution of his authority and within the course of his employment, but the master is not liable where the servant is not acting in the execution of his authority and without the course of his employment.—Archuleta v. Floersheim Mercantile Co., N. M., 187 Pac. 272.

71. **Municipal Corporations**—Police Power.—Whether an ordinance enacted in the exercise of the police power is calculated to promote the object of its enactment, or the municipal legislative will has been clearly expressed, is not a question for the Court.—Ex parte Lerner, Mo., 218 S. W. 331.

72.——Ratification.—Ratification of a contract binding a city can only be by the city council acting as a body and may be effected by any action or contract which gives to the contract the stamp of approval, and this may be done by acquiescence with knowledge of the facts.—Tracy Cement Tile Co. v. City of Tracy, Minn., 176 N. W. 189.

73. **Negligence** — Attractive Nuisance. — An open, unguarded stope in a dark abandoned mining tunnel, connected with a new tunnel, with a track for small push cars, left outside of the tunnels, unfastened and uninclosed held to constitute an attractive nuisance, rendering the mine owner liable for the death of a boy 11 years old, who fell into the stope while playing on the cars.—Faylor v. Great Eastern Quicksilver Mining Co., Cal., 187 Pac. 101.

74.——Child.—Child of five not guilty of contributory negligence. — Terre Haute, I. & E. Traction Co. v. Stevenson, Ind., 126 N. E. 34.

75.——Licensee.—Persons soliciting one for the use of his automobile to take them to picnic grounds and return are mere licensees, to whom he owed only the duty of refraining from wantonly or willfully injuring them. — Lutvin v. Dopkus, N. J., 108 Atl. 862.

76.——Statutory Violation.—It is essential to the maintenance of an action for damages for personal injury, founded on the violation of a statute, to establish not only the violation, but that such violation was the proximate cause of the injury.—Waterman Lumber Co. v. Beatty, Tex., 218 S. W. 363.

77.——Ultimate Purchaser.—The manufacturer of an automobile, who fails to use reasonable care in inspecting and testing the wheels, is liable to a purchaser, injured by the breaking of a defective wheel, though such purchaser bought from a dealer.—Johnson v. Cadillac Motor Car Co., U. S. C. C. A., 261 Fed. 878.

78. **Parent and Child**—Negligence of Child.—Parent not liable for personal injury by an automobile negligently driven by son on the ground of agency.—Elms v. Flick, Ohio, 126 N. E. 66.

79. **Partnership**—Individual Act.—**The working** member of a nontrading partnership to grow potatoes could not bind the firm by his individual act in borrowing money for it and incumbering its property.—Gordon v. Aumiller, Wash., 187 Pac. 354.

80. **Principal and Agent**—Declarations by Agent.—Declarations of agent inadmissible to prove authority.—Bankers' Surety Co. v. German Investment & Securities Co., Ind., 126 N. E. 6.

81.——Retaining Benefits.—A principal retaining the benefits obtained for him by his agent cannot repudiate the acts of the agent inducing the other party to the contract to enter into it on the ground that such acts were **unauthorized**, as by accepting the contract he takes it w whatever taint attached to its origin, and by retaining the benefits he assumes the same responsibility therefor as though such acts had been authorized.—Roseberry v. Hart-Parr Co., Minn., 176 N. W. 175.

82.——Undisclosed Principal.—An undisclosed principal is bound by simple contracts made by his agent when the acts done by the agent are within the scope of his authority and in the course of his employment.—Bankers' Surety Co. v. Willow Springs Beverage Co., Neb., 176 N. W. 82.

83. **Principal and Surety**—Release of Surety.—If owner made a side agrement with contractor modifying the building contract as to making of payments, but did not disclose existence of such agreement to contractor's surety, the side agreement would be a fraud upon and would release surety.—Union Oil Co. of California v. Pacific Surety Co., Cal., 187 Pac. 14.

84. **Railroads**—Custom and Usage.—Custom and usage of railroads using a yard not to require warning signals that cars on a general delivery track were being repaired did not excuse the repair man of a road in voluntarily and unnecessarily risking the known and obvious danger of having a car moved upon him by the other road in switching, by getting under it without displaying the usual repair signals.—Lavelle's Adm'r v. Central Vt. Ry. Co., Vt., 108 Atl. 918.

85.——Trespasser.—Railroad's duty to trespasser on tracks is merely to exercise ordinary care for his preservation after discovery of his peril, and to refrain from inflicting willful or wanton injury.—Carr v. United Rys. & Electric Co. of Baltimore, Md., 108 Atl. 872.

86. **Sales**—Conditional Sale.—A conditional vendee cannot, before title is vested in him, recover general damages for a breach of warranty.—Baca v. Fleming, N. M., 187 Pac. 277.

87.——Executory Contract.—An executory contract for the future sale of a commodity is not enforceable, unless by the terms of the contract it is so intended, and there is certainty as to the subject-matter and price.—Tift v. Shiver & Aultman, Ga., 102 S. E. 47.

88.——Express Warranty.—A warranty is "express" when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase.—Hausken v. Hodson-Feenaughty Co., Wash., 187 Pac. 319.

89. **Specific Performance**—Injunction.—Where a married woman's suit for specific performance of a land contract is pending, and defendant sues out a warrant to evict plaintiff's husband, with whom plaintiff resides as a tenant holding over, injunction will issue at plaintiff's instance to restrain execution of the warrant, if it appears that the specific performance suit is prosecuted in good faith and is well founded.—Dowling v. Doyle, Ga., 102 S. E. 27.

90. **Street Railroads**—Last Clear Chance.—If a pedestrian, about to cross the track of a street railroad, sees a car coming at such distance that he has reasonable ground to suppose that he can cross in safety, he is justified in making the attempt; and if the operator of the car sees him, it is his duty to give him a reasonable opportunity to cross. — Ploxin v. Brooklyn Heights R. Co., U. S. C. C. A., 261 Fed. 854.

91. **Theaters and Shows**—Police Power.—As the amusement business is a private business, and not a business affected with a public interest, it may be exercised under the police power of the state.—O'Neil v. Providence Amusemnt Co., R. I., 108 Atl. 887.

92. **Trusts**—Trust Fund.—A cestui que trust may trace and recover trust funds unlawfully diverted by his trustee.—Stokes v. Burlington Count Trust Co., N. J., 108 Atl. 863.

93. **Usury**—Pari Delicto.—The parties to a uusurious transaction are not regarded in equity as in pari delicto.—Ice v. Barlow, W. Va., 102 S. E. 127.

94. **Wills**—Ademption.—Where the purchaser's rights were based upon a written agreement to convey and not upon a codicil subsequently executed by the vendor, the fact that the vendor agreed to convey to another after making his codicil does not defeat the purchaser's contract rights under the principle of ademption.—Lynam v. Harvey, Del., 108 Atl. 850.